

No. 11-1898

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In The  
United States Court of Appeals  
For the  
Eighth Circuit

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***TOM BRADY, et al.,***

***Plaintiffs - Appellees,***

**vs.**

***NATIONAL FOOTBALL LEAGUE, et al.,***

***Defendants - Appellants.***

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MINNESOTA,  
No. 0:11-cv-00639-SRN-JJG

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**BRIEF OF THE NATIONAL FOOTBALL LEAGUE COACHES ASSOCIATION  
*AMICUS CURIAE* IN SUPPORT OF THE PLAINTIFFS-APPELLEES**

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## STATEMENT OF INTEREST

The National Football League Coaches Association (“NFLCA”) is a nonunion voluntary association that represents the interests of coaches and assistant coaches currently employed by the thirty-two individual National Football League (“NFL”) teams, as well as many retired coaches formerly employed by those NFL teams.<sup>1</sup> These coaches are already experiencing hardship from the NFL’s lockout and are vulnerable to irreparable injury if league operations are suspended for a significant period of time.

The NFL’s coaches are, on average, forty-six years in age, work year-round, and for the twenty-six weeks surrounding the season typically work eighty-hour weeks with no days off. Despite having reached the pinnacle of their profession, and despite their unusually demanding schedules, NFL coaches operate with very little job security. Coaches predominantly work on two-year contracts and are subject to the expectations of immediate success from owners and fans. Coaches who do not lead their teams to playoff appearances or engineer significantly improved win–loss records right away are routinely fired. *See, e.g.,* Vito Stellino, *So Much for Loyalty*, FLA. TIMES–UNION, Jan. 27, 2007, at C-1 (observing a growing trend of rampant firings of NFL coaches, especially assistant coaches). In the last three years alone, more than 60 coaches have been fired from a position they held for two years or less, and every two years, approximately 40–45% of all NFL coaches change jobs. Each displacement requires coaches either to uproot their family to pursue new employment or to leave their families to live temporarily on their own. Coaches are regularly buying and selling homes—many currently

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<sup>1</sup> No person or entity other than *amici* made a monetary contribution to the preparation or submission of this brief. Counsel of record for both parties have consented to this brief’s filing. The letters of consent have been filed with the Clerk.

juggle multiple mortgages—and understand that each new move and new job comes with less security and bigger expectations.

The burdens of little job security and frequent moves mean that a prolonged lockout would inflict significant economic harm and career risks on the coaches.

First, on a purely pecuniary level, a lockout threatens coaches' income. Anticipating a lockout, the NFL teams for the past several years have been demanding a provision in the coaches' employment contracts (which are negotiated individually with each coach) that authorizes the employing team to withhold part of a coach's salary in the event that league operations were suspended. *Cf. White v. Nat'l Football League*, Civil No. 4-92-906, 2011 WL 706319 (D. Minn. Mar. 1, 2011) (ruling the NFL breached its obligations under the CBA by negotiating "lucrative work-stoppage payments" with broadcasters.) The teams introduced these "lockout clauses" virtually simultaneously, and they quickly became a standard in all the coaches' contracts. Michael Marot. *Coaches Face 50 Percent Pay Cuts*, ESPN, Mar. 16, 2011, <http://sports.espn.go.com/nfl/news/story?id=6154464> (describing how these lockout clauses give the teams the ability to cut salaries, sometimes in half, if a lockout arises). Whereas they were not in any of the coaches' employment contracts just four years ago, they now are in nearly every NFL coach's contract. *Id.* Thus, coaches are currently obligated to continue working in spite of the lockout, just as they must every offseason, yet many now receive only a fraction of their salary. *See* Rich Cimini, *New York Jets to Cut Coaches' Salaries If Lockout*, ESPNNEWYORK, Mar. 1, 2011, <http://sports.espn.go.com/new-york/nhl/news/story?id=6169534>. These income reductions are occurring amid the burdens of mortgage payments, tuition, and other life costs that do not wait for the NFL to end its lockout.

Second, given the imperative to produce immediate results, a lockout also threatens coaches' career prospects. Coaches desperately need time with their players to prepare for the upcoming season. The spring and summer months are crucial both to prepare players physically for the demanding season and also to teach the players the offensive and defensive schemes that will be used throughout the year. This is especially true for new coaches, who are burdened by the same expectations for success (despite usually inheriting teams with few recent accomplishments) yet are responsible for instituting and executing new plans. League rules recognize the unique difficulties of being a new coach by, for instance, permitting new coaching staffs to gather players for up to three mini-camps while permitting only one for all returning staffs. A lockout will leave inadequate time to conduct these extra mini-camps and prepare for the upcoming season. New coaches, who are already vulnerable, will be at a severe disadvantage to produce the results owners and fans expect.

Coaches who cannot produce immediate results suffer irreparable harm. They must uproot their families to seek employment elsewhere, and they have difficulty overcoming the perception of failure. The hours and effort demanded of assistant coaches are justified only by the prospect of lucrative and stable employment that follows proven success. Failure at an early stage of one's career, however, can falter career aspirations for many subsequent years. A lockout will significantly impinge on coaches' opportunities to prove themselves and will increase the likelihood that they will suffer failure they can neither avoid nor overcome.

### **SUMMARY OF ARGUMENT**

The NFL is attempting an end-run around a unanimous Supreme Court. Just last year, an unwavering Court ruled that the NFL is fully subject to section 1 of the Sherman Act, 15 U.S.C. § 1 (2006). *Am. Needle, Inc. v. Nat'l Football League*, 130 S. Ct. 2201 (2010). In seeking

coercive tools to lockout the players, the NFL now comes to this Court asking for rulings that would carve loopholes into the antitrust laws and severely dilute the purpose underlying the Supreme Court's decree. Succumbing to the NFL's view of the law would grant the NFL teams a broad license to commit a variety of antitrust violations, rendering the Sherman Act fruitless against anticompetitive collusion the NFL might direct at nonunion employees like the NFL's coaches.

Because the NFL's coaches have many common interests, they have formed a nonunion professional association to support their ability to assert their individual rights and to advance issues of shared concern. The coaches rely on vigorous enforcement of the antitrust laws to ensure that the NFL does not pursue pernicious concerted action that would stifle demand for their services or impose anticompetitive employment conditions upon them. The coaches urge this court to reject the arguments being advanced by the NFL that would curtail antitrust enforcement on behalf of individual coaches.

The NFL first asks this Court to interpret the Norris–LaGuardia Act, 29 U.S.C. § 101 *et seq.* (2006), to preclude injunctive relief to nonunion employees like the NFL's coaches. It asks that the Act govern “*any* controversy concerning terms or conditions of employment,” (Appellant's Br. 17, May 9, 2011 (emphasis in original)) and that the Act apply regardless of whether a union is involved. Such an interpretation would undermine the coaches' individual rights to invoke the antitrust laws to prevent collusive employment practices. It would deny injunctive relief to the coaches even if they are targets of naked antitrust violations. Individual employees have relied heavily on injunctive relief—and have received injunctive relief by this and other courts—to remedy antitrust violations.



The NFL also asks that the nonstatutory labor exemption protect its group boycott even under a challenge from individual employees. Such a broad antitrust immunity would enable the NFL to apply anticompetitive restraints on a currently competitive labor market for coaches.

The coaches, especially assistant coaches and especially those on new coaching staffs, are threatened with irreparable harm if the lockout continues. Owners and fans increasingly demand immediate success, and coaches whose teams cannot fulfill such severe expectations face likely dismissal, which means the uprooting of families, economic dislocation, and a significantly less promising career path. To meet management's expectations, coaches need adequate time in the offseason to prepare their players for the season ahead. The lockout has already interfered with the coaches' offseason plans for their players, and each day lost in preparing for the season further diminishes coaches' opportunities to prove themselves and advance their career.

## **ARGUMENT**

### **I. The NFL Seeks to Avoid Proper Application of the Sherman Act**

#### **A. NFL Coaches are Nonunion Employees that Rely on the Sherman Act and Injunctive Remedies to Protect Themselves Against Anticompetitive Employment Practices**

Coaches in many commercial sports leagues are vulnerable to coordinated attacks from employers. The NCAA, for example, adopted a plan to constrain the wages of assistant coaches, *see Law v. NCAA*, 134 F.3d 1010 (10th Cir. 1998), and the specter of such efforts is of great concern to current NFL coaches.

In light of many of the NFL's recent actions, the NFL's coaches fear they soon will be subject to coordinated cost cutting. Some NFL teams already targeted compensation packages for coaches, reducing their offering of pensions and health insurance that previously was an important part of coaches' compensation. Chris Mortensen, *Colts Coaches Among Those*

*Retiring*, ESPN, May 8, 2009, <http://sports.espn.go.com/nfl/news/story?id=4147407>. Other reductions in compensation have also been explored, such as teams offering their coaches less-generous health insurance plans. Because NFL coaches are often forced to live separate from their families and are frequently required to relocate to obtain find new employment, they have particular needs for health insurance, pensions, and other financial protections. These needs often go unrecognized by their individual employers. *See, e.g.*, Mike Freeman, *Pro Football Notebook: Assistant Coaches Are Seeking Better Treatment from N.F.L. Owners*, N.Y. TIMES, Sept. 27, 1998, § 8, at 8 (discussing frustration among current and former NFL coaches, with one stating “What we are interested in is respect and a little dignity.”).

The coaches have opted not to avail themselves of the labor laws and instead rely on the antitrust laws to protect themselves against anticompetitive collusion. *See, e.g.*, Amicus Brief of the National Football League Coaches Association in Support of Petitioner, *Am. Needle, Inc. v. Nat’l Football League*, 130 S. Ct. 2201 (2010) (No. 08-661). Vigorous antitrust enforcement maintains a competitive labor market for coaches, especially assistant coaches, who otherwise are vulnerable to strong-arm collusive practices. *See* Greg A. Bedard, *Assistants and Agents Caught in the Crossfire*, BOSTON.COM, May 22, 2011, [http://www.boston.com/sports/football/articles/2011/05/22/assistants\\_and\\_agents\\_caught\\_in\\_the\\_crossfire/?page=1](http://www.boston.com/sports/football/articles/2011/05/22/assistants_and_agents_caught_in_the_crossfire/?page=1) (observing that “assistant coaches have never had a strong collective voice—and they don’t complain about anything for fear of losing their jobs”).

Appropriately, injunction remedies have been available to coaches when antitrust violations have occurred. *Law v. NCAA*, 134 F.3d 1010 (10th Cir. 1998). This Court also has a history of awarding injunctive relief to remedy antitrust violations. *See, e.g.*, *Mackey v. Nat’l Football League*, 543 F.2d 606 (8th Cir. 1976) (affirming an injunction to prevent the NFL from

enforcing the Rozelle Rule); *ES Dev., Inc. v. RWM Enters., Inc.*, 939 F.2d 547, 557–58 (8th Cir. 1991) (affirming the district court’s authority to enjoin a per se violation of section 1 of the Sherman Act); *Rosebrough Monument Co. v. Mem’l Park Cemetery Ass’n*, 736 F.2d 441, 444–46 (8th Cir. 1984) (affirming an injunction to prevent defendants from illegally tying the purchase of foundation-preparation services to the purchase of cemetery plots); *Sun Newspapers, Inc. v. Omaha World-Herald Co.*, 713 F.2d 428 (8th Cir. 1983) (per curiam) (affirming an injunction to prevent the defendant from illegally abusing its monopoly position).

**B. The Norris–LaGuardia Act Should Not Sanction  
Antitrust Violations That Injure Nonunion Employees**

The NFL now urges an interpretation of the Norris–LaGuardia Act that would severely limit an individual coach’s ability to invoke the Sherman Act to protect his employment interests. The NFL asks this Court to interpret section 1 of the Act, 29 U.S.C. § 101 *et seq.*, to cover “any controversy concerning terms or conditions of employment.” (Appellant’s Br. 17, May 9, 2011 (emphasis in original); *see also id.* at 19–23 (“The Act applies regardless of whether a union is involved.”).) Such an expansive reading would encompass any and all anticompetitive actions the NFL might take against its coaches. It would leave individual coaches without injunctive remedies even in the face of the most pernicious per se violations of the Sherman Act, including naked group boycotts. This is a particularly perverse outcome if labor law does not permit the NFL’s assistant coaches, because of their supervisory duties, to form a union of their own (although the NFLCA reserves the right to contend that it does). Adopting the NFL’s argument would remove the coaches’ most crucial protection against collusive wage restraints and other anticompetitive employment practices.

This would put a particular burden on the many assistant coaches who rely on their wages to support their families. In contrast with many head coaches, assistant coaches have neither the

longevity nor the established reputations to bargain on equal terms with ownership, and most do not have retirement or alternative employment as possible alternatives to coaching. These assistant coaches are of particular concern to the NFLCA. They, especially, rely on a competitive labor market and need to maximize every time-sensitive opportunity made available to them. These coaches would be especially vulnerable if the Norris–LaGuardia Act denied them injunctive relief and were used now to delay the start of the season.

In short, the NFL asks this Court to turn the Norris–LaGuardia Act on its head. It is commonly accepted that the Act was designed to prevent union-management labor disputes from turning into antitrust actions. The NFL suggests instead that the Act should sanitize antitrust violations by turning them into labor disputes.

**C. The Nonstatutory Labor Exemption Should Not Prevent Nonunion Employees from Invoking the Sherman Act**

There is a short path from “employers attempting to force employees to *remain* in a union so as to preserve the employers’ valuable antitrust exemption,” *Brown v. Pro Football, Inc.*, 50 F.3d 1041, 1065 (D.C. Cir. 1995) (Wald, J., dissenting) (emphasis added), and employers attempting to force employees to *form* a union so as to preserve the antitrust exemption. As the appellants recognize, the antitrust laws and labor laws are alternatives for governing the labor market. The NFL’s coaches have historically opted to invoke the antitrust laws, rather than the labor laws, to ensure fair employment practices.

If this Court accepts the NFL’s expansive interpretation of the nonstatutory labor exemption, the coaches’ reliance on the antitrust laws would be undermined. Of particular concern is one amici’s suggestion that antitrust immunity should be in force even when “the employees are functioning as an organization or association seeking better terms and conditions of employment.” (Br. of the National Hockey League 12–13.) Such a rule would prevent

nonunion associations like the NFLCA to advance the common interests of its members. It might even force the NFL's coaches to form a union to preserve basic protections against plainly anticompetitive actions.

This Court's determination of the parameters of the nonstatutory labor exemption should ensure that nonunion employees can still invoke the antitrust laws as intended. Similarly, the NFL's coaches should not be forced to unionize to maintain access to a competitive labor market or retain basic employment rights.

## **II. A Prolonged Lockout Inflicts Irreparable Harm on the NFL's Coaches**

A court considering the issuance of an injunction weighs not just the potential for irreparable harm to the parties but the public interest as well. *Winter v. NRDC*, 129 S. Ct. 365, 376–77 (2008) (“[C]ourts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction.”). The district court appropriately incorporated into its decision the “many layers of tangible economic impact, ranging from broadcast revenues down to concession sales.” *Brady v. Nat'l Football League*, Civ. No. 11-639, 2011 WL 1535240, at \*36 (D. Minn. Apr. 25, 2011). In this group of interested economic parties—at a level of severity that far exceeds those mentioned by the district court—belong the NFL's coaches.

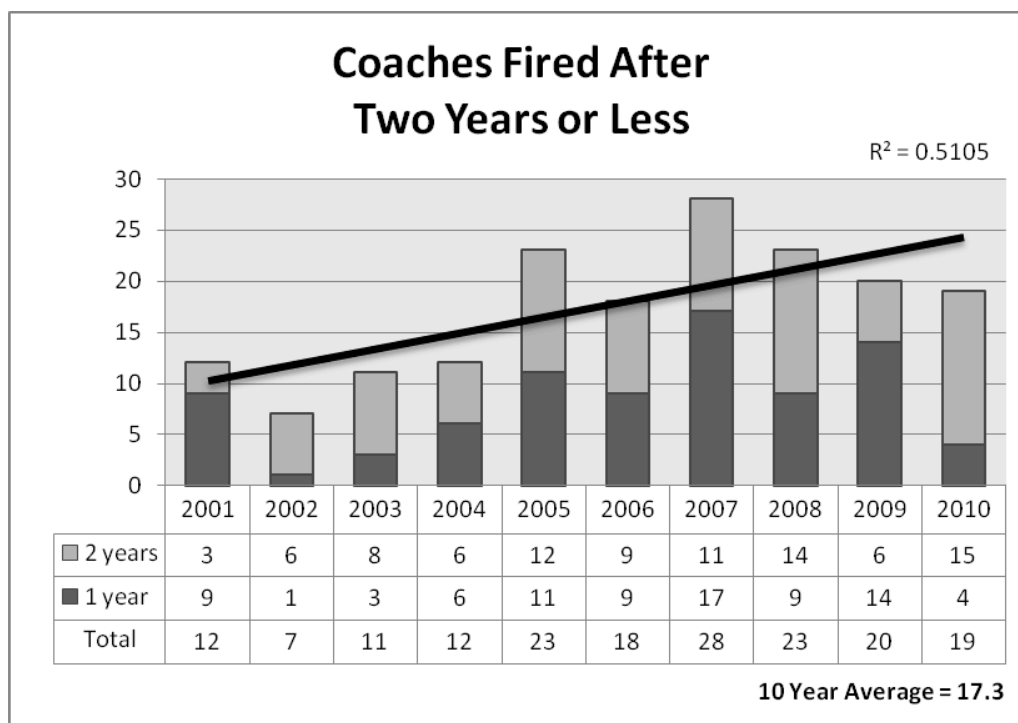
The NFL's coaches are at the pinnacle of the coaching profession, yet their career paths still are characterized by extreme instability. As was noted above, *supra* at 1-3, “lock-out clauses” will soon cause reductions in coaches' salaries. Some teams have also started cutting back on other forms of compensation to coaches as well. *See, e.g.*, Jarrett Bell, *Lockout Casualty: Bills Stop Funding Coaches Retirement Funds*, USA TODAY, May 24, 2011, <http://content.usatoday.com/communities/thehuddle/post/2011/05/lockout-casualty-bills-stop->

funding-coaches-retirement-funds/1 (reporting that “coaches are feeling the pinch of the NFL lockout in their retirement plans”).

More significant, today’s coaches are subject to expectations from owners and fans that increasingly demand immediate success. Coaches who do not lead their teams to playoff appearances or engineer significantly improved win-loss records right away are routinely fired. *See Stellino, supra* (reporting that the number of coaches fired each year after less than three years on the job has risen significantly in recent years). Over the past ten years, over seventeen coaches have been fired each year, on average, after only two years on the job or less, and approximately twenty coaches per year have been fired after three years on the job.<sup>2</sup> Moreover, firing rates of such coaches have been steadily on the rise. Despite the need to uproot families and relocate homes with each job change, coaches are afforded little financial protection against the whims of management and rarely obtain contracts for longer than two years.



<sup>2</sup> Data for these calculations and for representations in accompanying charts were collected from Pro-Football-Reference, NFL.com, Lexis, Westlaw, ESPN.com, and other on-line sources.



Accordingly, coaches—especially new coaches—have very little margin for error. Those who do not succeed in the upcoming season are significantly less likely to keep their jobs beyond their two-year contract, and those who lose their jobs will have significant difficulty obtaining equal employment.

Preparation is a coach's currency, and coaches rely heavily on the offseason to prepare their players for the season. If the NFL's lockout denies coaches the necessary time with players, coaches will be significantly more limited in their ability to prepare their teams and to prove their value as coaches. See Mike Freeman, *No OTAs, No Minicamps? This Season Could Be Ugly*, CBSSPORTS, May 17, 2011, <http://www.cbssports.com/nfl/story/15073510/no-otas-no-minicamps-this-season-could-be-ugly> (reporting that losing offseason organized team activities will result in underprepared teams and more injuries during the season). The lockout is already limiting coaches' plans for the upcoming season, with prominent coaches reducing their

playbooks and lamenting how a “lot of football is lost.” Mike Reiss, *Lockout Makes Bill Belichick, New England Patriots, Scale Back Plans*, ESPNBOSTON, May 17, 2011, <http://sports.espn.go.com/boston/nfl/news/story?id=6558894&campaign=rss&source=NFLHeadlines>; Gary Graves, “*Lot of Football Being Lost*” in *Lockout, and It’s Not Coming Back*, USA TODAY, May 11, 2011, [http://www.usatoday.com/sports/football/nfl/2011-05-11-minicamps-schedule\\_N.htm](http://www.usatoday.com/sports/football/nfl/2011-05-11-minicamps-schedule_N.htm).

In many ways, the fate of the coaches is interlocked with the junior players—players who are on the proverbial bubble of the roster. These coaches and players each desperately need time with each other to prepare for the upcoming season. If a lockout reduces the time available to prepare for the season, both will be under pressure to ready the players faster than conventional wisdom condones. Such pressures often lead to player injury, since players who play before undergoing adequate preseason are always subject to greater-than-normal risk of injury, and player injuries in turn reduce the entire team’s prospects for success. Freeman, *supra* at 6 (observing that a lack of offseason preparation results in sloppier play and more injuries); Ray Didinger, *NFL Notebook: Lockout Will Make the Product Suffer*, CSNPHILLY, May 15, 2011, [http://www.csnphilly.com/05/14/11/bNFL-Notebookb-Lockout-will-make-product/landing\\_insider\\_didinger.html?blockID=522766&feedID=704](http://www.csnphilly.com/05/14/11/bNFL-Notebookb-Lockout-will-make-product/landing_insider_didinger.html?blockID=522766&feedID=704) (underscoring the importance of minicamps for teaching the playbook and making players physically ready for the new season).

New coaches especially need time with players, which is why league rules normally permit new coaching staffs to organize two additional minicamps with players over the summer. This offseason, NFL teams hired an unusually large number of new head coaches with no previous head coaching experience, each of whom—along with their assistants—face a steep learning curve and desperately need this time to prepare their teams. Barry Wilner, *Difficult Welcome to NFL for New Coaches*, WASH. TIMES, Mar. 24, 2011, <http://www.washingtontimes>



.com/news/2011/mar/24/difficult-welcome-to-nfl-for-new-coaches/ (describing the “damaging dynamic” the lockout imposes on new coaches, particularly this year with so many new hires).

The lockout, if left in force, will prevent the coaches from meaningfully preparing and readying themselves for the season. While all coaches will be exposed to greater risk of failure, the eight teams with new coaching staffs are at particular risk. Since unforgiving expectations for immediate results will persist regardless of any lack of opportunity to prepare, these eight coaching staffs are losing irreplaceable time to prepare for a job that demands success.<sup>3</sup> Thus, a lockout that prevents coaches from preparing their players for the season will inflict irreparable harm on all coaches; coaches on the eight new staffs—especially the new assistant coaches on those staffs—will suffer even greater harm that will be even more impossible to repair.<sup>4</sup>

Damages would not be an adequate remedy for NFL coaches who suffer from the NFL’s illegal group boycott. The lockout will be responsible for avoidable professional failures, and damages cannot compensate the coaches and their families for such harm. Each firing means uprooting a family and burdening a coach with a perceived failure. Even though the coaches are merely collateral damage in the NFL’s targeting of the players, they are vulnerable to severe personal and professional harm that cannot be monetized.

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<sup>3</sup> There are also three additional coaches who have only spent one season with their teams (Mike Shanahan, Chan Gailey, and Pete Carroll), and some long-time coaches, like Jack Del Rio and Gary Kubiak, were rehired but reportedly received an ultimatum from their team’s owner that their teams must make the playoffs to keep their jobs. Vito Stellino, *Jack Del Rio Survives Despite Similar Record as Jeff Fisher*, FLA. TIMES–UNION, Feb. 1, 2011, at C-1; Matt Musil, *The HEAT Is on for Smith, Kubiak on Draft Day*, KHOU, Apr. 24, 2011, <http://www.khou.com/sports/Musil-The-HEAT-is-on-for-Smith-Kubiak-on-draft-day--120578359.html>.

<sup>4</sup> By late May in the typical offseason, all teams would have held minicamps for drafted and undrafted rookies, and new coaching staffs would likely have held at least one mandatory minicamp for the whole team. Coaches also would supervise player workouts at team facilities throughout the spring. Therefore, at the time of this writing, coaches have already lost valuable time preparing their players for the season. If the lockout were to continue into the summer, time for additional minicamps will pass, and coaches will increasingly lose the opportunity to adequately prepare for the season.

In considering whether to grant equitable relief and enjoin the NFL's lockout, this Court should consider the many professionals whose livelihoods and careers hang in the balance of the upcoming season. For these coaches, failure even at this highest level means the uprooting of families, economic dislocation, and a significantly less promising career path. These coaches will suffer irreparable harm if the lockout is sustained for any significant amount of time.

### **CONCLUSION**

For the forgoing reasons, the NFL should be appropriately subject to section 1 of the Sherman Act, in accordance with the recent decree of a unanimous Supreme Court. *Am. Needle, Inc. v. Nat'l Football League*, 130 S. Ct. 2201 (2010). The NFLCA therefore urges the Court to grant the petitioners equitable relief and end the NFL lockout. Both the Norris-LaGuardia Act and the nonstatutory labor exemption should be interpreted to ensure that equitable relief remains available to individual nonunion employees to combat anticompetitive collusion. A contrary ruling would expose nonunion employees like the NFL's coaches to even the most pernicious antitrust violations. Granting equitable relief will also permit the NFL's coaches to avoid the irreparable harm that comes with delaying the start of preseason preparations and will give the coaches a fair chance to preserve their employment and advance their careers.



BARAK D. RICHMAN

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May 20, 2011

Paul D. Clement  
Bancroft PLLC  
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Washington DC, 20036  
(202) 234-0900  
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Re: *Brady v. National Football League*, Eighth Circuit No. 11-1898

Dear Mr. Clement:

I plan to file a brief *amici curiae* on behalf of the NFL Coaches Association in support of the plaintiffs-appellees in the above-captioned case. If you consent to the filing, kindly sign the acknowledgment below and return it to me at your earliest convenience.

Sincerely,

A handwritten signature in black ink, appearing to read "Barak Richman".

Barak Richman  
Professor of Law and Business Administration

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I am counsel of record for the defendants-appellants in the above-mentioned matter. I hereby consent to the filing of a brief *amici curiae* of the NFL Coaches Association in support of plaintiffs-appellees.

A handwritten signature in black ink, appearing to read "Paul D. Clement".

Paul D. Clement

May 25, 2011

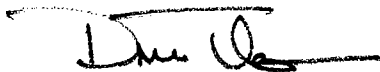
Barak D. Richman  
Professor of Law and Business Administration  
Duke University School of Law  
Science Drive and Towerview Drive  
Box 90360  
Durham, NC 27708-0360

Re: *Brady v. National Football League, Eight Circuit No. 11-1898*

Dear Professor Richman:

I represent the Brady plaintiffs in the above-captioned matter. I consent to the filing of an amicus brief by the NFL Coaches Association.

Sincerely,



Andrew S. Tulumello

AST/jg